

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ISAAC ACOSTA-ESPINOSA,

Plaintiff,

V.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,¹

Defendant.

Case No. C16-5831-JCC

ORDER REVERSING AND REMANDING CASE FOR FURTHER ADMINISTRATIVE PROCEEDINGS

Isaac Acosta-Espinosa seeks review of the denial of his application for Supplemental

Security Income and Disability Insurance Benefits. The parties agree this matter must be

remanded but disagree as to the scope of the remand. Mr. Acosta-Espinoza contends the ALJ

erred in: (1) failing to consider degenerative disc disease of the cervical and thoracic spine and

degenerative joint disease of the hips at step two; (2) failing to consider whether he met Listings

1.04 at step three; (3) evaluating the medical opinions of Huang Lakin, D.O., and Nancy

Armstrong, ARNP: (4) failing to include visual limitations in the residual functional capacity

(REC); and (5) evaluating his own symptom testimony. Dkt. 17 at 1. Mr. Acosta-Espinoza al-

¹ Nancy A. Berryhill is now the Acting Commissioner of the Social Security Administration. Pursuant to Federal Rule of Civil Procedure 25(d), Nancy A. Berryhill is substituted for Carolyn W. Colvin as defendant in this suit. The Clerk is directed to update the docket, and all future filings by the parties should reflect this change.

1 notes that his subsequent application for benefits was granted during the pendency of the instant
2 appeal with a disability onset date of the day following the ALJ's decision denying benefits in
3 the instant case. Dkt. 17-1. He contends that, given the ALJ's finding of disability on the
4 subsequent application, "there is no serious doubt that [he] is disabled" and the only question is
5 as to the onset date of his disability. Dkt. 17 at 2, 18. He argues that the evidence the ALJ
6 allegedly erred in considering should be credited as true and the matter should be remanded for
7 an award of benefits. Dkt. 17 at 18. Alternatively, he requests that the case be remanded for
8 further administrative proceedings.

9 The Commissioner, in response, concedes the ALJ erred at step three in failing to
10 consider whether Mr. Acosta-Espinoza met Listing 1.04 at step three and moves to remand the
11 case for further administrative proceedings. Dkt. 20 at 2. The Commissioner further contends
12 that the subsequent ALJ decision granting benefits should also be considered on remand to
13 determine whether the instant decision denying benefits and the subsequent decision awarding
14 benefits can be reconciled. *Id.* The Commissioner disputes all of Mr. Acosta-Espinoza's other
15 assignments of error. *Id.* at 4-18. As discussed below, the Court **REVERSES** the
16 Commissioner's final decision and **REMANDS** the matter for further administrative proceedings
17 under sentence four of 42 U.S.C. § 405(g).

BACKGROUND

19 On May 7, 2013, Mr. Acosta-Espinoza applied for benefits, alleging disability as of
20 September 21, 2011. Tr. 12. Mr. Acosta-Espinoza's applications were denied initially and on
21 reconsideration. Tr. 12, 134-73. The ALJ conducted a hearing on March 5, 2015, as well as a
22 supplemental hearing on August 7, 2015, at which time Mr. Acosta-Espinoza moved to amend

1 his alleged disability onset date to October 7, 2013.² Tr. 30-131. On December 28, 2015, the
2 ALJ issued a decision finding Mr. Acosta-Espinoza not disabled. Tr. 12-23. Both parties
3 acknowledge that subsequent to that decision, and while the instant appeal was pending, Mr.
4 Acosta-Espinoza filed a new claim for benefits and was found disabled with an onset date of
5 December 29, 2015. Dkts. 17, 17-1, 20.

6 **THE ALJ'S DECISION**

7 Utilizing the five-step disability evaluation process,³ the ALJ found:

8 **Step one:** Mr. Acosta-Espinoza has not engaged in substantial gainful activity since his
alleged onset date of September 21, 2011.

9 **Step two:** Mr. Acosta-Espinoza has the following severe impairments: diabetes mellitus
10 with peripheral neuropathy, degenerative disc disease of the lumbar spine,
11 acromioclavicular joint arthritis of the left shoulder, traction detachment of the right
retina, status post-surgery, bilateral vitreous hemorrhages of the eyes, and proliferative
diabetic retinopathy.

12 **Step three:** These impairments do not meet or equal the requirements of a listed
imPAIRMENT.⁴

14 **Residual Functional Capacity:** Mr. Acosta-Espinoza can perform light work subject to
the following additional limitations: he can frequently balance, stoop, kneel, crouch, and
crawl; he can occasionally climb ramps, stairs, ladders, ropes, or scaffolds; and he should
have no greater than frequent exposure to vibrations and to hazards as defined by the
15 Dictionary of Occupational Titles (DOT).

17 **Step four:** As Mr. Acosta-Espinoza can perform past relevant work he is not disabled.

18 **Step five:** In the alternative, as there are jobs that exist in significant numbers in the
national economy that Mr. Acosta-Espinoza can perform, he is not disabled.

20 Tr. 12-23. The Appeals Council denied Mr. Acosta-Espinoza's request for review making the

21 _____
22 ² In his decision, the ALJ only discusses the original alleged onset date and does not mention Mr. Acosta-
Espinosa's motion to amend the alleged onset date. Although it is not ultimately relevant to the Court's
decision here, this issue should also be clarified by the ALJ on remand.

23 ³ 20 C.F.R. §§ 404.1520, 416.920.

⁴ 20 C.F.R. Part 404, Subpart P. Appendix 1.

1 ALJ's decision the Commissioner's final decision. Tr. 1-4.⁵

2 DISCUSSION

3 A. Step Three

4 At step three, the ALJ must determine whether a claimant's impairments meet or equal a
5 listed impairment. 20 C.F.R. §§ 404.1520(a), 416.920(a). The listings describe specific
6 impairments that are considered "severe enough to prevent an individual from doing any gainful
7 activity regardless of his or her age, education, or work experience." 20 C.F.R. §§ 404.1525(a),
8 416.925(a). A claimant whose impairments either meet or equal a listing is presumptively
9 disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a).

10 Here, the parties agree the ALJ erred at step three in failing to evaluate whether Mr.
11 Acosta-Espinoza met or equaled Listing 1.04. Mr. Acosta-Espinoza specifically argued at the
12 hearing, as well as in his opening brief, that his impairments met Listing 1.04A. Dkt. 17 at 7-9;
13 Tr. 120. Listing 1.04 provides:

14 Disorders of the spine (e.g., herniated nucleus pulposus, spinal
15 arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease,
16 facet arthritis, vertebral fracture), resulting in compromise of a nerve root
17 (including the cauda equina) or the spinal cord. With:

18 A. Evidence of nerve root compression characterized by neuro-anatomic
19 distribution of pain, limitation of motion of the spine, motor loss
20 (atrophy with associated muscle weakness or muscle weakness)
21 accompanied by sensory or reflex loss and, if there is involvement of
22 the lower back, positive straight-leg raising test (sitting and
23 supine)[.]

24 20 C.F.R. Part 404, Subpart P. Appendix 1. Mr. Acosta-Espinoza specifically pointed to the
25 evaluation by Patrick J. Halpin, M.D. as evidence that he met the requirements of the listing.
Dkt. 17 at 7-9; Tr. 120. The ALJ did not address Dr. Halpin's evaluation in his opinion and the
Commissioner does not dispute the ALJ erred at step three in failing to consider Listing 1.04.

⁵ The rest of the procedural history is not relevant to the outcome of the case and is thus omitted.

1 Because the ALJ made no findings with respect to Listing 1.04 at step three, and the parties
2 agree this was error, the Court finds remand for further proceedings is necessary for the ALJ to
3 address this issue. On remand, the ALJ should evaluate whether Mr. Acosta-Espinoza met or
4 equaled Listing 1.04 at step three.

5 **B. Step Two**

6 Mr. Acosta-Espinoza also argues the ALJ erred by failing to consider cervical and
7 thoracic degenerative disc disease and degenerative joint disease of the hip at step two. Dkt. 17
8 at 10.

9 At step two of the sequential evaluation, the Commissioner must determine “whether the
10 claimant has a medically severe impairment or combination of impairments.” *Smolen v. Chater*,
11 80 F.3d 1273, 1290 (9th Cir. 1996); 20 C.F.R. §§ 404.1520(a), 416.920(a). The claimant has the
12 burden to show that (1) she has a medically determinable physical or mental impairment, and (2)
13 the medically determinable impairment is severe. *See Bowen v. Yuckert*, 482 U.S. 137, 146
14 (1987). The step-two inquiry is a “*de minimis* screening device to dispose of groundless claims.”
15 *Smolen*, 80 F.3d at 1290. An impairment is medically determinable if it results from anatomical,
16 physiological, or psychological abnormalities which can be shown by medically acceptable
17 clinical and laboratory diagnostic techniques. 20 C.F.R. §§§§ 404.1527(a), 404.1508(a),
18 416.927(a), 416.908(a). An impairment or combination of impairments is severe if it
19 significantly limits the claimant’s physical or mental ability to do basic work activities. 20
20 C.F.R. §§§§ 404.1520, 404.1521(a), 416.920, 416.921(a). An impairment or combination of
21 impairments may be found “‘not severe’ only if the evidence establishes a slight abnormality that
22 has ‘no more than a minimal effect on an individual’s ability to work.’” *Smolen*, 80 F.3d at 1290
23 (citing *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)). The claimant has the burden of

1 proving his “impairments or their symptoms affect his ability to perform basic work activities.”

2 *Edlund v. Massanari*, 253 F.3d 1152, 1159-60 (9th Cir. 2001).

3 With respect to his thoracic spine, Mr. Acosta-Espinoza points to evidence that x-rays
4 revealed abnormalities in the spine at the mid-back, with anterior wedging at T11, T12 and L1.
5 Dkt. 17 at 5. However, Mr. Acosta-Espinoza fails to point to any evidence that this impairment
6 produced symptoms that affected his ability to perform basic work activities. A diagnosis alone
7 is not sufficient to establish a severe impairment. Accordingly, Mr. Acosta-Espinoza fails to
8 establish the ALJ erred in failing to consider degenerative disc disease of the thoracic spine at
9 step two.

10 However, with respect to Mr. Acosta-Espinoza’s cervical spine the ALJ points out, albeit
11 with less than ideal clarity, that Mr. Acosta-Espinoza was not only diagnosed with cervical
12 degenerative disc disease but he complained of neck pain and was found to have “very
13 diminished reflexes” attributable to cervical spondylosis. Dkt. 17 at 6-7; *see* Tr. 775 (Dr. Snow
14 noting evidence of cervical spondylosis and very diminished reflexes); 773 (Dr. Abbott noting x-
15 ray showed “prominent C7 transverse process as well as multilevel osteophytes throughout the
16 cervical spine. [...] multilevel DDD present as well.”). Furthermore, with respect to hip
17 degenerative joint disease, Mr. Acosta-Espinoza points to x-rays indicating degenerative changes
18 of the right hip and prominent vascular calcifications suggesting atherosclerotic disease, out of
19 proportion with the patient’s age. Dkt. 21 at 6-7; Tr. 473-74, 579. He also points to treatment
20 notes indicating right hip range of motion causing pain with flexion, persistent hip and back pain,
21 right hip, leg and foot pain causing problems with walking, standing, twisting and sitting. Dkt.
22 21 at 6-7; Dkt. 17 at 5; Tr. 584, 624-85, 684-85. He further notes that his hip impairment is part
23 of the basis for Dr. Lakin’s opinion limiting him to sedentary level work. Dkt. 21 at 6-7; Dkt. 17

1 at 5; Tr. 579-81. This evidence was sufficient to present a colorable claim that cervical
2 degenerative disc disease and hip degenerative joint disease were severe impairments.

3 The Commissioner argues any step two errors were harmless because the ALJ proceeded
4 beyond step two and Mr. Acosta-Espinoza did not identify a limitation omitted from the RFC
5 assessment. Dkt. 20 at 13-15. An ALJ's failure to properly consider an impairment at step two
6 may be harmless where the ALJ considered the functional limitations caused by that impairment
7 later in the decision. *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007). However, here, the
8 ALJ failed to even mention cervical degenerative disc disease or hip degenerative joint disease
9 anywhere in the decision, leaving no means for the Court to determine whether the ALJ
10 considered the effects of these impairments at the later steps. Moreover, the ALJ is required to
11 consider the combined effects of a claimant's impairments, even if an impairment by itself would
12 not rise to the level of a severe impairment. 20 C.F.R. §§ 404.1523, 416.923. If a combination
13 of impairments is medically severe, the ALJ must consider the combined impact throughout the
14 disability determination process. *Id.* The claimant's impairments “must not be fragmentized in
15 evaluating their effects.”” *Lester v. Chater*, 81 F.3d 821, 828 (9th Cir. 1995) (quoting *Beecher v.*
16 *Heckler*, 756 F.2d 693, 694–95 (9th Cir.1985)). Here, there is nothing to indicate that the ALJ
17 considered degenerative disc disease of the cervical spine and degenerative joint disease of the
18 hips in combination with any other impairments.

19 Because the ALJ erred at step two, and the error was not harmless, remand is appropriate.
20 On remand, the ALJ should evaluate cervical degenerative disc disease and hip degenerative
21 joint disease and determine whether they are medically determinable severe impairments and, if
22 they are, whether alone or in combination with other impairments they meet or equal a listing.

23 **C. Scope of Remand**

ORDER REVERSING AND REMANDING
CASE FOR FURTHER ADMINISTRATIVE
PROCEEDINGS - 7

1 Mr. Acosta-Espinoza asks the Court to remand the case with directions that the medical
2 opinions of Huong Lakin, D.O. and Nancy Armstrong, ARNP, and his own testimony be
3 credited as true and benefits be awarded. Dkt. 17 at 18. Alternatively, Mr. Acosta-Espinoza
4 asks the Court to remand the case for further proceedings. *Id.*

5 In general, the Court has “discretion to remand for further proceedings or to award
6 benefits.” *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may remand for
7 further proceedings if enhancement of the record would be useful. *See Harman v. Apfel*, 211
8 F.3d 1172, 1178 (9th Cir. 2000). The Court may remand for benefits where (1) the record is
9 fully developed and further administrative proceedings would serve no useful purpose; (2) the
10 ALJ fails to provide legally sufficient reasons for rejecting evidence, whether claimant testimony
11 or medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ
12 would be required to find the claimant disabled on remand. *Garrison v. Colvin*, 759 F.3d 995,
13 1020 (9th Cir. 2014). “Where there is conflicting evidence, and not all essential factual issues
14 have been resolved, a remand for an award of benefits is inappropriate.” *Treichler v. Comm’r of
15 Soc. Sec. Admin.*, 775 F.3d 1090, 1101 (9th Cir. 2014). The application of the “credit-as-true”
16 rule for a direct award of benefits “is a rare exception” to the ordinary remand rule. *Leon v.
17 Berryhill*, --- F.3d --- (9th Cir. Nov. 7, 2017), 2017 WL 5150294 at *2. “Where ... an ALJ makes
18 a legal error, but the record is uncertain and ambiguous, the proper approach is to remand the
19 case to the agency.” *Treichler*, 775 F.3d at 1105.

20 The Court finds that here, where the ALJ failed to address issues in the first instance both
21 at step two and at step three, not all factual issues have been resolved and remand for further
22 proceedings is appropriate. Because the Court finds that remand for further proceedings is
23 necessary at step two, and the parties agree the ALJ erred in failing to consider Listing 1.04 at

1 step three, the Court does not address the other issues Mr. Acosta-Espinoza raises at later steps.
2 The ALJ's evaluation of the evidence at later steps may change or become moot based on his
3 step two and step three findings. The Court also notes that even if it were appropriate to reach
4 the other issues raised by Mr. Acosta-Espinoza, which it does not, and even if the ALJ did err
5 with respect to those issues, there is other conflicting evidence in the record and the record, as it
6 stands, does not compel a finding of disability during the period in question. Accordingly,
7 remand for further proceedings is appropriate.

CONCLUSION

9 For the foregoing reasons, the Commissioner's final decision is **REVERSED** and this
10 case is **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. §
11 405(g). On remand, the ALJ should: (1) reevaluate the severity of cervical degenerative disc
12 disease and hip degenerative joint disease at step two; (2) reevaluate the combined effects of all
13 of Mr. Acosta-Espinoza's impairments and evaluate whether his impairments, alone or in
14 combination, meet or equal a listing at step three; (3) specifically evaluate whether Mr. Acosta-
15 Espinoza meets Listing 1.04 at step three; (4) develop the record as necessary and consider any
16 other evidence he or she deems appropriate, including but not limited to the subsequent finding
17 of disability which the Commissioner herself acknowledges should be considered on remand;
18 and, (4) if necessary, reassess Mr. Acosta-Espinoza's symptom testimony, the medical opinion
19 evidence, and his residual functional capacity, and proceed with steps four and five with the
20 assistance of a vocational expert if warranted.

DATED this 27th day of November, 2017.

John C. Carpenter

JOHN C. COUGHENOUR
United States District Judge